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239–431—66——1

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 687

ILLINOIS CENTRAL RAILROAD COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

No. 688

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

No. 689

MONON RAILROAD, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission jointly move that the judgment of the lower court be affirmed.

STATEMENT

This case involves direct appeals from the judgment of a three-judge district court (J.S. 1a–27a),[1] one judge dissenting (J.S. 28a–33a), sustaining an order of the Commission dated February 16, 1965, in its consolidated Finance Docket Nos. 21755, 21892 and 21980, whereby the Commission granted Missouri Pacific Railroad's application to acquire stock control of Chicago & Eastern Illinois Railroad (C&EI, referred to by the Commission as Eastern).

For many years prior to this case, C&EI was in a precarious financial position (J.S. 91a). It is a bridge and terminal railroad running south from Chicago to Woodland, Illinois, where it forms two branches: to East St. Louis and Thebes, Illinois on the west; and to Evansville, Indiana on the east. Its lines are end-to-end in relation to the lines of Missouri Pacific Railroad Company (MoPac)[2] and the Louisville & Nashville Railroad Company (L&N, referred to by the Commission as Dixie Line),[3] but are side-

[1] References are to appellants' Joint Appendices to Jurisdictional Statement.

[2] MoPac operates railroad lines in Arkansas, Colorado, Illinois, Kansas, Louisiana, Missouri, Nebraska, Oklahoma, and Texas. The principal points of interchange of traffic between MoPac and C&EI are St. Louis, Missouri, and East St. Louis and Thebes, Illinois (J.S. 117a).

[3] L&N operates 5,683 miles of railroad line in thirteen States. Its principal main lines extend from Cincinnati, Ohio, to New Orleans and to Atlanta, Georgia; from Louisville, Kentucky to St. Louis via Evansville; from Evansville to Nashville, Tennessee; from Bowling Green, Kentucky to Memphis, and from Paducah, Kentucky to Memphis. L&N interchanges freight traffic with C&EI at Greenville, East St. Louis and Evansville and through passenger traffic at Evansville. The lines of L&N

by-side in relation to the lines of appellant Illinois Central Railroad Company (IC)[4] between Chicago and East St. Louis. IC, which competes with C&EI, has direct access to the Chicago gateway; MoPac and L&N do not.

Both MoPac and IC applied to the Commission under 49 U.S.C. 5(2) for authority to acquire stock control of C&EI. L&N asked that, as a condition of any such authorization, C&EI be required to negotiate for the sale of the Evansville branch to it. Appellants Monon Railroad and St. Louis Southwestern Railroad (Cotton Belt) intervened in opposition to the application; Monon also opposed L&N's petition.

Prior to filing its application for control in September 1961, MoPac had purchased—without Commission authority—about 31 percent of C&EI's voting preferred stock and about 17 percent of its outstanding common stock. On April 9, 1962, it conveyed the securities to an independent voting trust (J.S. 82a) settled by MoPac to divest itself of the power to control C&EI (J.S. 86a). While the matter was still pending before the Commission, MoPac purchased certain C&EI bonds but immediately conveyed them

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and C&EI are supplementary and provide the shortest routes for traffic between Chicago and major points in the Southeast (J.S. 154a).

[4] IC operates 6500 miles of main and branch lines in fourteen midwestern and southern States. Its principal main lines extend from Chicago southwardly to New Orleans and southwesterly to St. Louis, southeasterly to Evansville, Indiana, and westerly to Omaha, Nebraska. IC's lines provide routes and service between Chicago and East St. Louis to the southwest and Evansville to the southeast, thus having common terminals with C&EI (J.S. 132a–133a).

to the trust (J.S. 17a). In September 1961, L&N also purchased enough C&EI voting preferred and common stock to give it a 27½ percent voting interest in the company. It immediately conveyed this to a voting trust like MoPac's (J.S. 88a). On its own motion, the Commission (J.S. 37a) began an investigation of the L&N and first MoPac purchase, and consolidated it with the pending control applications.

The voting trust agreements of MoPac and L&N contained substantially the same terms (J.S. 88a). They provided that the trusts were irrevocable and were to remain effective for ten years or until the occurrence of stated events (J.S. 86a).[5] No limitations or restrictions were imposed on the trustees' authority to vote the securities independent of the settlors (J.S. 88a).

The Commission's examiner held that neither Mopac nor L&N had violated Section 5(4) of the Act, 49 U.S.C. 5(4), by acquiring C&EI securities without Commission approval, because they had not exercised power of control. He recommended that MoPac's application should be granted, but that a condition requiring C&EI to negotiate with L&N for the sale of the Evansville line would not be in the public interest at the present time and should, therefore, not be imposed.

On exceptions, and after oral argument,[6] the

[5] These events are (1) the sale of the deposited securities to persons not affiliated with the settlors, or (2) a Commission order authorizing the release of the securities (J.S. 86a).

[6] Appellant Monon did not participate in the oral argument of exceptions before the Commission. Appellant Cotton Belt neither filed exceptions nor participated in the oral argument.

Commission held that MoPac had committed a violation of Section 5(4) when it purchased the C&EI stock without prior Commission approval, because its stock purchases gave it "negative control".[1] The Commission noted, however, that the violation was mitigated by (1) MoPac's voluntary creation in good faith of a voting trust, modeled on ones prescribed or approved by the Commission in other proceedings, that effectively divested it of its negative control over C&EI; and (2) by the fact that during the eight months prior to creation of the voting trust MoPac never exercised its power or influenced or attempted to influence C&EI's management (J.S. 84a–85a, 89a–90a).

The Commission agreed with the examiner's finding that L&N had not violated Section 5(4), since immediately upon acquisition it had subjected its stock interest in C&EI to a voting trust similar to that created by MoPac (J.S. 88a–89a). It also held that charges of various parties that MoPac had violated Section 5(4) by subsequent acquisitions of C&EI securities were moot since, immediately upon the acquisition of these securities, MoPac had placed them in the voting trust (J.S. 89a)

Turning to the public interest consideration, the Commission held that MoPac's application should be

[1] The Commission found that, assuming the amount of stock voted at C&EI stockholder's meetings would follow the established pattern of the preceding six years, MoPac's holdings were sufficient to have prevented the favorable vote of the two-thirds majority of stock required to approve a merger, lease or sale of assets, so that MoPac could have vetoed such transactions (J.S. 84a).

granted because its control of C&EI would (1) preserve that carrier as an operating railroad; (2) improve its financial status and physical facilities, and enable it to increase its participation in transcontinental traffic; and (3) furnish MoPac with direct-line access to and from Chicago, thus increasing its ability to compete with other major railroads operating directly to and from that gateway (J.S. 91a, 43a), without serious adverse effects upon other carriers serving the same territory (J.S. 92a).

With respect to the conditions requested by the L&N, the Commission found, as had its examiner, that with appropriate modifications L&N's proposal with respect to purchase of the Evansville line would be in the public interest, because it would afford the shippers in the Southeast the same advantages that MoPac's control of C&EI would afford shippers in the Southwest, and would result in substantially upgrading the line. Unlike the examiner, however, the Commission determined that imposition of the requested conditions and retention of jurisdiction by it were necessary in order to assure L&N of the opportunity to negotiate for acquisition of the Evansville line upon just and reasonable terms consistent with the public interest (J.S. 57a, 67a–68a).

Appellants' petitions for reconsideration alleging that C&EI's financial position had improved subsequent to the hearing were denied.

On petitions for review, a three-judge district court, one judge dissenting, affirmed the Commission's report and order (J.S. 1a–27a). The court held that the Commission had properly balanced MoPac's viola-

tion of Section 5(4) against the public benefit which would flow from MoPac's control of C&EI, and that the independent voting trust effectively insulated C&EI from MoPac's control. It also found substantial evidence in the record as a whole to support the Commission's findings that the public interest would be best served by MoPac's control of C&EI; that the provision for negotiations looking to sale of C&EI's Evansville line to L&N was a lawful condition; and that the Monon could raise any objections concerning the competitive effects of the sale when and if the final application for approval of the sale was submitted to the Commission. Finally, the court held that the Commission had not abused its discretion in refusing to reopen the record. The dissenting judge disagreed with the court's conclusions only on the nature and effect of the voting trusts (J.S. 28a–33a).

ARGUMENT

1. The Commission's conclusion that approval of MoPac's application for control of C&EI would be consistent with the public interest, and that approval of IC's competing application would not, is in conformity with this Court's decision in *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U.S. 173. In that case, as in this, the Commission approved a control application designed to preserve the independent existence of a small "bridge carrier," and denied a competing application which contemplated the disappearance of the bridge carrier as an independent

road.[8] There, as here, the Commission sought to preserve inter-railroad competition.[9]

2. Appellants' contention that the Commission should not have approved MoPac's application because of MoPac's allegedly flagrant violations of Section 5(4) was properly disposed of by the court below by reference to *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115, which recognized that the Commission is not required to disqualify a Section 5(2) applicant because of a prior Section 5(4) violation. The Commission has, of course, long applied the flexible standard that the bar to consideration of a Section 5(2) application by a Section 5(4) violator "will give way to a clear showing of public interest in approval." 371 U.S. at 129; see *Central of Georgia R. Co—Control,* 307 I.C.C. 39, 43. Its

[8] Compare the Commission findings discussed by the Court at 361 U.S. 182–85 with the virtually identical findings of the Commission herein at J.S. 43a–49a, 91a–92a, discussed by the court below at J.S. 16a.

[9] With respect to this important aspect of the case the Commission found:

> An important motive behind the Illinois Central proposal is the desire to deny to both Missouri Pacific and Dixie Line an expedient access to the Chicago gateway. If successful, this design would fortify Illinois Central against increased competition from two strong, long-line rivals, as well as permit the elimination of competition from a short-line rival. There is no justification in the record for providing for such curtailment of competition. Approval of the Illinois Central plan would deny to shippers and receivers in the Southeast and in the Southwest a vastly improved direct-line service to and from the Chicago gateway for which this record contains abundant evidence of need. [J.S. 45a.]

application in the present case does not raise a substantial question warranting plenary review. *Alamo Express, Inc.* v. *United States*, 382 U.S. 19, affirming *per curiam* 239 F. Supp. 694 (W.D. Tex.). No regulatory agency in fact follows a rule of absolute disqualification [10]—and for obvious reasons of common sense. Such a rule would require the disapproval of a transaction plainly in the public interest on the basis of a trivial or inadvertent violation; it would punish the violator, but it would punish the public more.

The Commission carefully balanced the competing considerations in this case: the clear public interest in MoPac's acquisition of C&EI; and the relatively minor nature of the Section 5(4) violation. The argument that the Commission attached undue weight

[10] It should be noted that the Civil Aeronautics Board's "Sherman doctrine" does not purport to impose an absolute bar to consideration of applications for approval of control by applicants found to have previously unlawfully achieved some measure of control over the carrier sought to be controlled, but precludes Board consideration, in the absence of exceptional circumstances, only until the alleged violation has been voluntarily terminated or until the violator has taken the corrective action required by the Board. *Colonial-Eastern Acquisition Case*, 23 C.A.B. 500. Although it is true that the Board has recently taken the position that the voluntary creation of a voting trust does not satisfy these requirements (*Allegheny Airlines, Inc., Enforcement Case*, CAB Order No. E–21280 (Sept. 15, 1964)), we point out that where overriding public interest considerations are involved the Board has not hesitated to approve control by an applicant charged with being in violation of Section 408. See, *e.g.*, *Toolco–Northeast Control Case*, 36 C.A.B. 280.

to the creation of the voting trusts is plainly without merit. Similar arrangements have many times been approved by the Commission as adequate to divest control. That they may be revocable at will as a matter of State law is surely wide of the mark, since any attempt at revocation while the control application was pending would be a flagrant violation of Section 5(4) and lead to immediate denial of the application. The contingency is a wholly remote one.

Having found that there was substantial evidence to support the Commission's conclusion "that MoPac control is the clearly preferable future status for Eastern" (J.S. 16a) and that "the Commission was correct in saying that 'unlike the flagrant disregard for the law which characterized the situation in *Central of Georgia Ry. Co. Control,* 307 I.C.C. 39 (1958), there are in the present record a number of factors mitigating the unlawful conduct'" (J.S. 14a–15a), the court below properly refused to substitute its judgment for that of the Commission. *United States* v. *Pierce Auto Freight Lines, Inc.,* 327 U.S. 515, 535–536; *Virginian Ry. Co.* v. *United States,* 272 U.S. 658, 663; *Illinois Central R.R. Co.* v. *Norfolk & W.R. Co.,* Nos. 15, 17 and 20, October Term, 1966, decided November 14, 1966, slip opinion, p. 12.

3. Monon does not challenge the Commission's conclusion that acquisition of control of C&EI by MoPac would be consistent with the public interest. Rather its attack goes only to that portion of the Commission's order which requires compulsory negotiations between MoPac and L&N for the sale to the latter of C&EI's line between Chicago and Evans-

ville, Indiana.[11] We submit that Monon's attack is premature.

It is essential to state precisely what the Commission did in this respect. The Commission made extensive findings (unchallenged in the court below or here) that L&N's operation of the Evansville line would produce substantial service benefits for many shippers on traffic moving between Chicago and the Southeast. These findings support the Commission's conclusion (J.S. 57a) that "We would be derelict in our responsibility to serve the public interest, if, in the face of this record, we failed to provide [L&N] an opportunity to acquire the Evansville line," and that "with appropriate modification of [L&N's] proposal, the operation of that line by [L&N] would be consistent with the public interest." Accordingly,

[11] At this point, we note that Monon now states (J.S. 6) that "The Commission found that control of the C&EI by MoPac would be authorized if, and only if, the L&N operates through trains over the C&EI's Evansville-to-Chicago line". This statement misreads the Commission's report. The Commission has required, *as a condition subsequent* to MoPac acquiring control of C&EI, that MoPac cause C&EI to negotiate with L&N for the sale of the Evansville line upon terms agreed to by the parties, or if need be prescribed by the Commission, but, in either event, the purchase is to be considered by the Commission in another, separate Section 5 proceeding (J.S. 67a–68a); and, further, that if MoPac fails to acquire sufficient control of C&EI to comply with this condition, it must "divest itself forthwith of all of its Eastern holdings" (J.S. 92a). It is clear, however, that if the Commission prescribed sale terms which were unacceptable to L&N, the latter would be under no obligation to buy and MoPac could retain control of all of C&EI. Thus, there is no basis for Monon's contention that the Commission's authorization to MoPac cannot be final because Monon can still challenge acquisition of the Evansville line by L&N.

the Commission decided to require compulsory negotiations (upon MoPac's acquisition of control of C&EI), "but beyond that, any further action by us as to the purchase or lease must await the adduction of facts upon an appropriate record yet to be made." (J.S. 57a.) The Commission further specified (J.S. 68a) that L&N:

> * * * is to submit for consideration of this Commission by an appropriate application under section 5(2) of the Act, any agreement reached in the negotiations; but, if the parties are unable to arrive at mutually acceptable terms within the period set for the negotiations, that fact shall be brought to the Commission's attention with the filing of the said application; and, in either event, the Commission, pursuant to the Act, shall determine equitable, just and reasonable terms consistent with the public interest, upon which Dixie Line may accomplish the acquisition of the [Evansville line] * * *.

Monon contends, variously, that the Commission erred in finding that operation by L&N of the Evansville line would be "consistent with the public interest" without making findings as to its impact upon Monon as a competing carrier.

Treating with Monon's contentions, the court below concluded (J.S. 26a) that:

> Strictly speaking, we have before us only the question of the warrant in fact and law for the order requiring compulsory negotiations. It is not likely that mere negotiations will have any competitive effect whatsoever.
>
> The Commission appears to have decided, as it was required to do, the question of the ultimate desirability of L&N control of the Evans-

> ville line. While the findings that L&N's competitors would not be significantly injured by the proposed sale are probably sufficient under cases such as *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87–88 (1944), and are probably supported by substantial evidence, we need not decide these questions today. Monon will have ample judicial protection if and when the final L&N § 5(2) application for purchase of the Evansville line is approved by the Commission. Monon can raise its objections at that time.

The court below was clearly correct in holding that if and when L&N files an application under Section 5(2) for authority to acquire the Evansville line, Monon will have a further opportunity to show the competitive effects upon it of L&N operation of the Evansville line and to contend that such effects require denial of the application.[12]

The Commission made this crystal clear in its report and order of April 6, 1966, in *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475, authorizing a merger of those railroads. In that proceeding, Monon petitioned for further hearing and either inclusion in that merger or further protective

[12] There is no substance to Monon's contention (J.S. 9) that "the Commission decision and order established the immediate right in the L&N (App. p. 68a) to provide service over the Evansville line on a temporary basis pending final acquisition." It is clear on the face of Section 5(2) of the Interstate Commerce Act that there is no form of lease, operating agreement or trackage rights under which L&N could engage in interim operations over the Evansville line without applying for and obtaining specific authorization from the Commission. Moreover, L&N has publicly stated that it will not seek any such interim authorization.

conditions, alleging developments following the close of hearings which would make Monon more vulnerable to effects of a Penn-Central merger. One of the developments there cited by Monon was the approval in the instant case "of control of C&EI by [MoPac] with a condition respecting the acquisition by [L&N] of C&EI's line between Evansville, Ind., and Chicago, Ill." In denying Monon's motion, the Commission made the following statement (327 I.C.C. at 540):

> In Finance Docket No. 21755, L&N is accorded the right merely to negotiate for the acquisition of C&EI's Evansville-Chicago line. The acquisition itself would require our prior approval in a separate section 5(2) proceeding, *and any adverse effect thereof upon other carriers would be material to that proceeding, not here.* [Emphasis added.]

In this case, the Commission stated (J.S. 57a) that, with appropriate modification of L&N's proposal, operation of the Evansville line by L&N "would be consistent with the public interest"—the ultimate finding which it must make under Section 5(2). It was the predicate—and a necessary one—for requiring Mopac to agree to the transfer of the Evansville line to L&N on terms later to be approved or prescribed by the Commission on a record subsequently to be compiled. This finding, mandatory as to the negotiation conditions, specifically holds the way open for a full reappraisal of the competitive circumstances (including the effect upon Monon and other carriers), when and if L&N files an application under Section 5(2). It will also be relevant at that time to determine whether an approval should be accompanied by special conditions for the protection of Monon. Accordingly, there is no basis for Monon's view that in

such a subsequent Section 5(2) proceeding principles of *res judicata* will preclude it from challenging, or the Commission from reconsidering, whether the transaction, as finally shaped, will be "consistent with the public interest".

4. In the specific circumstances here, the Commission properly exercised its discretion when it declined to reopen the record to consider the subsequent acquisitions of C&EI securities by MoPac and the evidence of a late improvement in C&EI's revenues. The securities acquired by MoPac were immediately transferred to the independent voting trust which the Commission had already found effectively insulated C&EI from control by MoPac. While this practice is not to be condoned, as the Commission made clear when it found that Section 5(4) had been violated (J.S. 89a), neither does it require that the substantial benefits of the transaction be denied to the public. As to C&EI's improved fortunes, the Commission's decision took into account C&EI's financial and operational problems over many years (J.S. 91a). The relatively short range improvement in C&EI's operating results cited by appellants was not sufficient to require reopening here.[13] In the circumstances of this case, such a recent change in the company's financial condition is hardly the overwhelming

[13] As the Commission specifically stated in its order of June 23, 1966, denying Cotton Belt's belated petition for reopening and further hearing, "the alleged recent short-term improvement in the financial condition of the Chicago & Eastern Illinois Railroad Company is insufficient to warrant reconsideration of the Commission's conclusion, based on the long-term history of the carrier, that its affiliation with a stronger railroad will be consistent with the public interest."

change in circumstances which required rehearing in *Atchison, T. & S. F. R. Co.* v. *United States,* 284 U.S. 248. The Commission's refusal to reopen for the reasons advanced was well within the standards for rehearings defined in *United States* v. *Pierce Auto Lines,* 327 U.S. 515, 535 and *Interstate Commerce Commission* v. *Jersey City,* 322 U.S. 503, 514.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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